MOTION FILED
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No. 80-613

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ARAPAHOE AND SHOSHONE INDIAN TRIBES,

Petitioners,

v.

DRY CREEK LODGE, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO FILE BRIEF AMICI CURIAE

and

BRIEF OF AMICI CURIAE

of

PUEBLO OF COCHITI, PUEBLO OF ISLETA, PUEBLO OF JEMEZ, PUEBLO OF NAMBE, PUEBLO OF SANDIA, PUEBLO OF SAN ILDEFONSO, PUEBLO OF SAN JUAN, PUEBLO OF ZIA and ALL INDIAN PUEBLO COUNCIL, INC.

L. LAMAR PARRISH, ESQ.
USSERY & PARRISH, P.A.
P.O. Box 487
Albuquerque, New Mexico 87103
Attorneys for Amici Curiae, Pueblo of Isleta, Pueblo of Jemez, Pueblo of Nambe, Pueblo of Sandia, Pueblo of San Juan, Pueblo of Zia, and All Indian Pueblo Council, Inc.

PHILIP R. ASHBY
CLAYBURGH, ASHBY, ROSE AND PASKIND, P.A.
618 Manzano, N.E.
Albuquerque, New Mexico 87110
Attorneys for Amici Curiae, Pueblo of Cochiti and the Pueblo of San Ildefonso.

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Come now the PUEBLO OF ISLETA, the PUEBLO OF JEMEZ, the PUEBLO OF NAMBE, the PUEBLO OF SANDIA, the PUEBLO OF SAN JUAN, the PUEBLO OF ZIA, and the ALL INDIAN PUEBLO COUNCIL, INC., by and through their attorney, USSERY & PARRISH, P.A., and PUEBLO OF COCHITI and PUEBLO OF SAN ILDEFONSO, by and through their attorneys, CLAYBURGH, ASHBY, ROSE and PASKIND, P.A., and allege:

1. ALL INDIAN PUEBLO COUNCIL, INC., is an organization consisting of the nineteen (19) Indian Pueblos in the State of New Mexico, a non-profit corporation under the laws of the State of New Mexico, the purpose of which is to act in concert for the advancement of goals common to the Indian Pueblos of New Mexico.

2. The movant Indian Tribes are each Indian Tribes duly recognized by the United States, exercising powers of self-government.

3. All of the movants would be profoundly and adversely affected if the decision herein by the United States Court of Appeals is allowed to stand.

4. Consent has been obtained from the Petitioners to file this motion and a brief amici curiae in this cause. Consent has not been obtained from the Respondents.

5. The basic legal questions of law herein are:

(A) Did *Santa Clara v. Martinez,* 436 U.S. 49 (1978), reaffirm the Doctrine of Sovereign Immunity for Indian Tribes and thereby protect the tribes from suits by all third parties?

(b) Did the *Martinez* case merely establish that only tribal members are prohibited from suing a tribal government for matters relating to the internal workings of tribal government?

These questions are of utmost concern and importance to the movants herein for the reason that the decision of the Tenth Circuit Court of Appeals in *Dry Creek Lodge, Inc., et al., vs. Arapahoe and Shoshone Tribes,* Cause No. 78-1999 (10th Cir., June 20, 1980), if affirmed, will severely cloud the long-standing traditions of the movants, endanger tribal sovereignty, and again open all tribal governments to a myriad of suits of all types and, moreover, will severely burden Federal District Courts in "Indian country."

6. The above questions of law may well not be adequately presented to this Court for reason that the facts presented to the trial court, as reviewed by the Tenth Circuit, do not show the much broader impact this decision would have on other tribes in other circumstances.

7. The movants desire to submit a brief in support of the Petition for Writ of Certiorari heretofore submitted.

WHEREFORE, the movants respectfully move this Court for an Order allowing them to file a brief amici curiae on the merits in support of the Petitioners.

L. LAMAR PARRISH, ESQ.
USSERY & PARRISH, P.A.
P.O. Box 487
Albuquerque, New Mexico 87103
Attorneys for Amici Curiae,
Pueblo of Isleta, Pueblo of Jemez, Pueblo of Nambe, Pueblo of Sandia, Pueblo of San Juan, Pueblo of Zia, and All Indian Pueblo Council, Inc.

PHILIP R. ASHBY
CLAYBURGH, ASHBY, ROSE AND PASKIND, P.A.
618 Manzano, N.E.
Albuquerque, New Mexico 87110
Attorneys for Amici Curiae,
Pueblo of Cochiti and the Pueblo of San Ildefonso.

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BRIEF OF AMICI CURIAE

I. INTEREST OF AMICI CURIAE

The ALL INDIAN PUEBLO COUNCIL, INC., is an organization composed of all nineteen (19) Indian Pueblos in the State of New Mexico, a non-profit corporation under the laws of the State of New Mexico, the purpose of which is to act in concert for the advancement of goals common to the Indian Pueblos of New Mexico. The movant Indian Tribes, the PUEBLOS OF ISLETA, JEMEZ, NAMBE, SANDIA, SAN JUAN, and ZIA, are Indian Tribes duly recognized by the United States, exercising powers of self-government. All tribes, except for the PUEBLO OF JEMEZ, are organized under the Act of June 18, 1934, 25 USC 461, *et seq.*; this Pueblo is, however, recognized as a tribal government by the United

States of America and has plenary power over its tribal members and all tribal affairs. All of the Pueblos in New Mexico have very active Pueblo governments. New Mexico is not a P.L. 280 State, which means that all jurisdiction, criminal and civil, with respect to its own affairs and those of Indian people, resides in the tribal government and not in any State jurisdiction. All of the Pueblos are extremely active in not only their own internal tribal affairs, but also dealing with other entities, including the Federal Government, State Government, County Government, local government, lessees, joint ventures, all manner of contracting parties, other tribes, and, in general, they deal much as would a municipal government with people and entities. The long-standing principle of Sovereign Immunity was reaffirmed in *Santa Clara v. Martinez,* 436 U.S. 49 (1978), by this Court in 1978.

If the present case stands and is not addressed by this Court, it will have a serious, adverse, and immediate impact upon the tribal sovereignty, tradition, culture, and religion of all of the movants. The basic question in this case is whether tribes enjoy sovereign immunity as a government or not. This question is of overwhelming importance to the movants and fundamental to the continuance of tribal government.

ARGUMENT

POINT ONE

THE DECISION OF THE TENTH CIRCUIT IS DIRECTLY CONTRARY TO THE DOCTRINE OF SOVEREIGN IMMUNITY ANNOUNCED BY THIS COURT.

In the *Martinez* case, *supra* this Court reaffirmed the Doctrine of Sovereign Immunity as it applied to Indian tribes. This was not a declaration of new law but was an affirmation of existing law, as manifested by this Court in

United States v. U.S. Fidelity and Guaranty Co., 309 U.S. 506 (1940). The *Martinez* case was a difficult tribal membership case arising out of an allegation by a female member of the Santa Clara Pueblo of sex discrimination. This Supreme Court ruled in essence that, except with respect to habeas corpus as expressed in 25 USC 1301, the Indian Civil Rights Act, Congress did not intend to waive the sovereign immunity which protected tribal governments. In the present case below, the Court of Appeals, notwithstanding the unusual reasoning contained in its opinion, did in fact hold that sovereign immunity was not truly sovereign immunity if a tribe acted in a way which the Court perceived as being unfair to non-Indian lessees.

If the law is to change, and sovereign immunity is to be denied to tribes, only Congress can so state. *Wilson v. Turtle Mountain Band of Chippewa Indians, et al.*, 459 F.Supp. 366, 369 (D.N.D., 1978). If the rules are to be changed by denying this protection, then Congress must also undertake a wide spectrum of questions regarding the special status of Indian tribes. For example, if Tribes are to be exposed to all manner of suits by disgruntled persons and entities, Congress should provide some machinery to adjudicate these claims (as opposed to the peculiar characterization of this case in District Court, an admixture of Constitutional rights and personal financial loss), forums to deal with it, legal staffs at Federal expense to protect the tribes, and perhaps rules of conduct adopted by the Secretary of Interior on ways in which tribes must treat non-Indians. None of these has been done by Congress. Until Congress does so, it is respectfully urged that no Court should seek to isolate a small piece of a large problem and rewrite the law regarding that piece.

POINT TWO

THE DECISION IN *SANTA CLARA V. MARTINEZ* WAS EMINENTLY CORRECT AND SHOULD BE REAFFIRMED BY THIS COURT.

The Tenth Circuit has chosen to either overrule or rise above the ruling in *Santa Clara v. Martinez, supra.* Apparently the Supreme Court must state yet again the meaning of sovereign immunity and the way in which sovereign immunity applies to Indian tribes.

A review of cases, beginning in 1968 when the Indian Civil Rights Act was passed by Congress, until 1978 when the clarifying opinion in *Santa Clara v. Martinez* was issued, shows the lower courts of the land were in considerable disarray concerning the interpretation of the Indian Civil Rights Act. Some Courts held that sovereign immunity only was waived with respect to a tribe in a case of habeas corpus; others allowed any claimant to sue a tribe for virtually any reason. For example, at the time of the rendering of the *Martinez* decision, pending in the Federal District Court of New Mexico were cases involving disgruntled Head Start teachers who, their jobs having been abolished because of changing Federal guidelines, sued the Pueblo of Isleta (*Dolores C. Lucero, et al., v. The Isleta Pueblo Tribe of Indians, et al.,* No. CIV-77-790M [D.N.M., 1978]), and an irritated sand and gravel permittee, ignoring Interior procedures for such things, who filed a case in Federal District Court concerning a business disagreement with the Pueblo of San Ildefonso (*Richard Cook v. Pueblo of San Ildefonso,* No. CIV-77-100M [D.N.M., 1978]). These cases were properly dismissed following the *Martinez* decision. If the present case is allowed to stand unchallenged, the flood gates will swing open again, and the tribal governments will be plagued by lawsuit after lawsuit, seemingly characterized by (1) being frivolous, and (2) being pursued straight

away in Federal Court instead of proceeding through the tribal government system or through Interior procedures.

CONCLUSION

The questions presented by the instant case are of overwhelming importance to the Pueblos and tribal organizations, amici curiae, and it is imperative that the Tenth Circuit decision be reviewed by the Supreme Court.

Respectfully submitted,

L. LAMAR PARRISH, ESQ.
USSERY & PARRISH, P.A.
P.O. Box 487
Albuquerque, New Mexico 87103
Attorneys for Amici Curiae,
Pueblo of Isleta, Pueblo of Jemez, Pueblo of Nambe, Pueblo of Sandia, Pueblo of San Juan, Pueblo of Zia, and All Indian Pueblo Council, Inc.

PHILIP R. ASHBY
CLAYBURGH, ASHBY, ROSE AND PASKIND, P.A.
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